No. 85-871

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

ALBERT T. WILLARDO, M.D.
Appellant-Petitioner herein

vs.

STATE OF INDIANA
Appellee- Respondent herein

APPEAL FROM THE SUPREME COURT OF INDIANA AND CERTIORARI TO THE SUPREME COURT OF INDIANA

REPLY OF APPELLANT-PETITIONER DR. WILLARDO TO STATE OF INDIANA'S MOTION TO DISMISS JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED FOR REVIEW

For Appeal: I.

(1) Whether a State statute requiring counsel to individually sign jury instructions and which is used to deny Petitioner's right to review on certain issues where the instructions were not so individually signed is repugnant to the guarantee of the fundamental right to due process of law as established by the Fourteenth Amendment to the Constitution of the United States.

In the event appeal is not granted as to question (1), it is prayed that the Court then grant writ of certiorari as to question (1).

For writ of certiorari: II.

(2) Whether the trial Court's holding that a state statute taking effect two years following the claimed

offense and reducing the number of jurors from twelve to six in Petitioner's trial on a criminal offense of theft violates the ex post facto provisions of Article I, Section 10 of the United States Constitution.

III.

(3) Whether a criminal indictment failing to state the alleged offense with sufficient certainty so as to leave the Petitioner to guess how, when, where and with whom in calendar year 1978 an alleged offense occurred is so vague as to violate the guarantee of Petitioner's fundamental right to due process of law as set forth in the Fourteenth Amendment to the United States Constitution.

AUTHORITIES

Cases:

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Braniff Airways v. Nebraska State Board
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FOREWARD

Appellant-Petitioner Dr. Albert T. Willardo by his counsel hereby timely files his Reply Brief in Opposition to the State's Motion to Dismiss pursuant to Supreme Court Rule 16.5. This brief is to be read in conjunction with and supplementary to the original Petition.

We also ask that the original Petition and this pleading be addressed to both the Indiana Court of Appeals whose Opinion we challenge and to the Supreme Court of Indiana which was the last court to render any form of decision in this case. According to Indiana Rule II (B) (4) of Appellate Procedure, the litigation between the parties terminated in that court.

ADDENDA

In the Authorities section of the original Petition, Carolina Dept. of Highways v. Barnwell is corrected to read South Carolina Dept. of Highways v. Barnwell Bros.

The case cited herein as Bryant v. Zimmerman is sometimes cited as New York ex rel Bryant v. Zimmerman or State ex rel Bryant v. Zimmerman. The common form is used.

We point out that the statement of the question on p. 4 of the State's Motion to Dismiss is incorrect as the Indiana Court of Appeals decided that question against Appellant and in favor of the State, which is why we challenge the application of that statute in this Court. That the question was not raised at trial is correct as the State first

raised it on appeal in Appellee's Brief on page 25.

FACTS

The facts are as stated in the Petition and are hereby incorporated by reference. We add that Dr. Willardo as Coroner of a large county delegated much administrative authority and that his testimony in the record shows lack of intent to defraud, mistake of fact, and that jury instructions were not given in this regard. Also, the conviction resulted from an erroneous statement of the law of embezzlement as found in Instruction No. 14 ((Appendix E @ A-37)).

ARGUMENT

I.

WHETHER A STATE STATUTE REQUIRING COUNSEL TO INDIVIDUALLY SIGN JURY INSTRUCTIONS AND WHICH IS USED TO DENY PETITIONER'S RIGHT TO REVIEW ON CERTAIN ISSUES WHERE THE INSTRUCTIONS WERE NOT SO INDIVIDUALLY SIGNED IS REPUGNANT TO THE GUARANTEE OF THE FUNDAMENTAL RIGHT TO DUE PROCESS OF LAW AS ESTABLISHED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

The Federal Constitutional Question Was Adaquetely and Timely Raised.

The State's Motion to Dismiss the Jurisdictional Statement ((hereinafter Motion to Dismiss)) states @ p.4. That the federal question was not raised at trial which is correct as IC 35-37-2-2 (6) was first raised in Appellee's Brief p. 25. The application of that statute, of which we complain in this Court was argued against in Appellant's Reply Br. at p5-7 and especially in Brief of Appellant in Support of His Petition to Transfer p. 19 "fundamental fairness" and

especially on p. 20 "due process", "fundamental right", "fundamental error", and that "procedural requirements must give way to the fundamental principles of due process". By not granting the Petition for Transfer, the Supreme Court of Indiana was the last court to give an adverse ruling on this due process issue.

Although former counsel might have used more magic words and phrases, the constitutional issue was timely raised and the unconstitutional application of IC 35-37-2-2 (6) was timely responded to. Cases cited by the State in its Motion to Dismiss p. 5 deal with matters where the constitutional question was first raised in the Petition or in oral argument in this Court, and are not

applicable in this case.

Also, Instruction No. 14 ((Appendix E @ A-37)) was objected to essentially on due process grounds where it was challenged by other tendered instructions, on the Motion to Correct Errors R. Vol. IV pp. 858ff and argument thereon, and in every brief filed by Dr. Willardo's counsel. This instruction held misappropriation to be synonomous with embezzlement, which is not the law~Hart v. State, 220 Ind 469 @486/44 N.E.2d 346 @ 354 (1942). It defined a criminal offense in terms of something not a criminal offense. This constitutes fundamental error which can be reviewed by this Court of its own motion Thompson v. City of Louisville, 362 US 199 @206 (1962) and Vachon v. New Hampshire, 414 US

478 dissent @483 (1974).

Where specific intent is an essential element of an offense, failure to give that instruction or to instruct as to each element of the offense is reversible error Ridge v. State, 192 Ind 639 @644-45/ 137 NE 758 @759 (1922) and Morrissette v. United States, 342 US 246 @274 (1952). These points are raised to show that due process arguments were raised throughout and that the errors complained of were reversible, substantial, and often fundamental so that IC 35-37-2-2 (6) as applied by the Indiana Court of Appeals and as not corrected by the Supreme Court of Indiana allowing erroneous instructions to go uncorrected and correct instructions to be waived violated

Dr. Willardo's rights to due process of law under the Fourteenth Amendment.

State Statute Can Be Challenged as Unconstitutional In Its Application.

A state statute may be challenged as unconstitutional in its application Dahnke Walker Milling Co. v. Bondurant, 257 US 282 @289/66 L Ed 234 @243 (1921). In Yick Wo v. Hopkins, 118 US 356 (1886) a city safety ordinance fair on its face was found to violate equal protection when applied only to Chinamen so as to deny them a livelihood @373-74. More to the point, in Chambers v. Mississippi, 410 US 284 (1973) state evidentiary and procedural rules denying the defendant the right to cross-examine his own witness and not allowing him to introduce certain

exculpatory evidence were found to violate due process @294-95, 297, 303. There, the State failed to balance its interests in procedure against the individual's rights to due process of law. This is precisely what occurred here with Dr. Willardo.

Federal Question Can Be Raised Imprecisely But With Clear Intendment.

Although it may be inexplicit, the federal question may be raised by clear intendment in the state courts below- Braniff Airways v. Nebraska State Board, 347 US 590 @599/98 L Ed 967 @977 (1953); Bryant v. Zimmerman, 278 US 63 @67 (1928) and Street v. New York, 394 US 576 @ 584 (1969) which quotes Bryant

No particular form of words or

> phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adaquetely presented.

That has occurred here ((SUPRA)). The constitutional question was raised here far more clearly than in Braniff 347 US 0599 where a claim of no taxable situs was held to raise the question of due process or in Largent v. Texas, 318 US 418 (1943) where a motion to quash citing the 14th Amendment 0419-20 was held sufficient to raise 1st Amendment issues applicable to the state throught the 14th Amendment.

State Courts Need Not Explicitly Decide the Constitutional Question.

The constitutional claim need not be decided explicitly in the state courts.

In Braniff v. Nebraska State Board 347 US 590 the state court decided the wrong constitutional question, namely, commerce clause instead of due process. In Lawrence v. State Tax Comm, 286 US 276 (1932) the state courts reached their decision on an unsubstantial and illusory state ground 282-83 which happended in the present case. Bryant v. Zimmerman, 278 US 60 holds that the ruling need not be put in direct terms, that "if the necessary effect of the judgment has been to deny the claim, that is enough" 367. This occurred here in the opinion of the Appellate Court and in the Indiana Supreme Court's denial of Petition to Transfer.

Jurisdiction Is Proper.

Jurisdiction is proper for this Court to grant appeal under 28 USC § 1257 (2) and for reasons given and cases cited above. The State's Motion to Dismiss under Supreme Court Rule 16.1 is improper and should be denied. In the alternative certiorari could be granted under 28 USC § 1257 (3), possibly 28 USC § 2103; and Supreme Court Rule 17.1 (c) and cases cited above and in the Petition.

We also note that the situation in Askew v. State, 439 N.E.2d 1350 (Ind. 1982) has repeated itself in Harding v. State 457 N.E.2d 1098 & 1101 (Ind. 1984), in the present case, and is capable of repetition.

II.

WHETHER THE TRIAL COURT'S HOLDING THAT A STATE STATUTE TAKING EFFECT TWO YEARS FOLLOWING THE CLAIMED OFFENSE AND REDUCING THE NUMBER OF OF JURORS FROM TWELVE TO SIX IN PETITIONER'S TRIAL ON A CRIMINAL OFFENSE OF THEFT VIOLATES THE EX POST FACTO PROVISIONS OF ARTICLE I, SECTION 10 OF THE UNITED STATES CONSTITUTION

The State's argument here goes more to the merits of the case than to the jurisdiction of this Court to grant certiorari on this question. The federal constitutional question was raised at all stages of state court proceedings below and was ruled upon adversely at all times.

We add that Thompson v. Utah, 170 US 343 (1898) has never been overruled as has been stated in Isoton v. State, 472 N.E.2d 653 (Ind. App. 1984) concurrence @653; that state courts taking a position adverse to our own

fail to understand the difference between "ex post facto" and "due process", that Thompson 170 US 0355 held the greater number of jurors at the time of the offense to be a substantive right; and that the triggering events in an "ex post facto" case of this type are the time of the offense and the time of trial 170 US 0355 and not merely the time of trial as believed in Iseton 472 N.E.2d concurrence 0653.

Jurisdiction is Proper.

Jurisdiction is proper under 28 USC § 1257 (3) and Supreme Court Rule 17.1 (b) and cases cited in the Petition 018-19 and Rule 17.1 (c) and Thompson 170 US 343. We should note that as states reduce the number of jurors, this situation is capable of repetition.

III.

WHETHER A CRIMINAL INDICTMENT FAILING TO STATE THE ALLEGED OFFENSE WITH SUFFICIENT CERTAINTY SO AS TO LEAVE THE PETITIONER TO GUESS HOW, WHEN, WHERE AND WITH WHOM IN CALENDAR YEAR 1978 AN ALLEGED OFFENSE OCCURRED IS SO VAGUE AS TO VIOLATE THE GUARANTEE OF PETITIONER'S FUNDAMENTAL RIGHT TO DUE PROCESS OF LAW AS SET FORTH IN THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

Former trial counsel made timely objection to the vagueness of the Indictment ((Appendix F @A-38)) on grounds of vagueness and inability to formulate a defense. Although the prosecution might have cured this problem with a bill of particulars or something similar, it did not do so, and the trial judge held the indictment to be good.

A reading of said indictment will show that it is vague, void for vagueness, fails to convey any information enabling

a defendant to defend, and the reader might well ask himself if he would like to be tried on an indictment that vague. This brings into play the fundamental error doctrine of Thompson v. City of Louisville, 362 US 0206 and Vachan v. New Hampshire 414 US dissent 0483 ((both SUPRA)).

Constitutional Question Raised in State Court.

That the constitutional question has been properly raised in state court and how that can happen has been argued already in the Question for Appeal in the sections dealing with "clear intendment" and that the state court need not decide the federal question explicitly but only that the judgment have adverse effect ((SUPRA)). A due process argument has been raised throughout.

The argument was that the Indictment failed to state the offense with certainty so that Defendant lacked adequate notice and was unable to formulate an adequate defense. This was timely raised before trial on a motion to dismiss, on the Motion to Correct Errors and argument thereon R.V. IV pp 858ff, Appellant's Brief pp 20-21; Reply Brief pp 3-4, and Brief of Appellant in Support of His Petition to Transfer p. 16.

The State's Motion to Dismiss p. 9 cites the Court of Appeals Opinion at A-31 asking in what manner the Indictment was deficient and also cites Hamling v. United States 09-10. We will deal with Hamling a bit later. The Reply Brief p. 3-4 cites the entire

calendar year of 1978 as vague, no statement of specific acts, or how others were involved. The Reply Brief cited Fadell v. State, 450 N.E.2d (Ind. App. 1983) where one count of conviction was reversed for failure of the indictment to state what people were involved and, essentially, how #115. The same three judges who decided Fadell failed to follow their own ruling in this case. That court did note that the one year time period could have prejudiced an alibi defense A-12 and indicated that an attack might have been made on "sufficiendy of the evidence itself" #A-32 but failed to follow up on these points. The latter point would come under fundamental error ((SUPRA)).

Appellant-Petitioner did raise a due

process question under the Fourteenth Amendment in the state courts as stated above, and also in this Court in his Petition 24-25 where cases decide 5th Amendment due process using the same standard applicable to the 14th Amendment. All this goes well beyond the "more inference" the State alludes to in its Motion to Dismiss p. 10.

In addition McDonald v. Mabee, 243 US 90 (1917) views due process as "fair play" 91 and "substantial justice" 92. Milliken v. Meyer, 311 US 457 (1940) focuses on notice and opportunity to be heard 463. Chambers v. Mississippi, 410 US 284, a criminal case, focused on notice and opportunity to defend. None of this was present in the indictment complained of.

Interestingly, Hamling v. United States, 418 US 87 (1974) holds an indictment valid when it tells "where", "how", "whom", and "by what mean" 391. None of that happended in the instant case.

The State seems to believe that the Indictment was fair and that the prosecution played fairly throughout. One might read R.V. I pp. 170ff and the interesting affidavit R.V. IV pp 866-869.

Jurisdiction is Proper.

Jurisdiction is proper under 28 USC § 1257 (3) and Supreme Court Rule 17.1 (c) and cases cited in Petition p. 24 and above.

PRAYER FOR RELIEF

Petitioner-Appellant Dr. Willardo prays that Appeal be granted on the first question or, in the alternative, that writ of certiorari issue. He also prays that this Court grant writ of certiorari on the second and third questions for reasons set forth in the Petition and also herein. Finally, he prays that the State's Motion to Dismiss Jurisdictional Statement be denied.

Respectfully submitted,

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